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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Issued by the Department of Transportation on February 28, 2003

NOTICE OF ACTION TAKEN – DOCKETS OST-1999-6210 – 370
OST-1998-6284, and OST-2002-11711-14
228

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Application of Delta Air Lines, Inc. filed 2/10/03 for:

XX Waiver of the 90-day dormancy condition applicable to Delta's U.S.-Argentina and U.S.-Brazil frequencies.

The Department has allocated Delta 7 weekly combination frequencies to operate in the Atlanta-Rio de Janeiro market (Dockets OST-1998-6284 and 2002-11711) and 7 weekly combination frequencies to operate in the Atlanta-Buenos Aires market (Docket OST-1999-6210). The frequencies are subject to the condition that they will expire automatically and revert to the Department for reallocation if they are not used for a period of 90 days.

Delta requests a waiver of the 90 day dormancy condition through December 31, 2003. Delta states that, due to adverse economic conditions it suspended its daily Atlanta-Rio de Janeiro and Atlanta-Buenos Aires flights on December 1, 2002. Delta's frequency allocation would automatically expire March 1, 2002, absent the waiver.

American Airlines and Continental Airlines filed answers in opposition and Delta filed a reply.

American states that the Department should deny Delta's request since Delta has not indicated any firm plans to resume service in the affected markets. In this connection, American maintains that the unused frequencies should be returned to the unallocated pool, where they will be available to interested carriers. American further states that denial would be consistent with Department policy with respect to passenger frequencies in limited-entry markets.

Continental states that it would not have an objection to Delta's request if the Department had not established a firm policy of requiring airlines to return frequencies to the Department for potential reallocation; that the Department has required it to return Brazil and Argentina frequencies, and Delta and Continental Micronesia to return Japan frequencies; and that it is not seeking a renewal of its own dormancy waiver for U.S.-Colombia frequencies in light of the Department's expressed policy.¹

¹ Continental added that if the Department grants Delta's waiver request, it should also extend Continental's Colombia dormancy waiver for the same period. We will not address this matter here. Continental is free to file an application for dormancy waiver of its Colombia frequencies if it so desires, and should it do so, we will consider its request in that context consistent with our policies.

Delta replied that neither American nor Continental have expressed interest in using the frequencies at issue. It states that the Argentina and Brazil markets are important to it; that it operated services in both markets before economic conditions forced it to cease those operations; that it expects to resume those services as soon as markets conditions allow (and in fact, is seeking to resume some services for an interim period on a code-share basis); and that under these circumstances the limited waiver it seeks is warranted. Delta also states that the Department has not applied a firm policy of confiscating frequencies when there were valid economic reasons that prevented operation of such service, but has reviewed each waiver on a case-by-case basis.

Applicant rep: Robert E. Cohn, 202-663-8060 DOT analyst: Sylvia Moore, 202-366-6519

DISPOSITION

XX Granted (see Remarks below)

The above action was effective when taken February 28, 2003, through December 31, 2003²

XX Action taken by: **Paul L. Gretch, Director**
Office of International Aviation

Remarks: We find that grant of Delta's request, in the particular circumstances presented, is in the public interest. We note that the waiver denial cases cited in the objections involved situations where we had already granted at least one, and sometimes more than one, dormancy waiver extension, and where we had expressly advised the holder of the waiver that further extensions of the waiver might not be forthcoming but would have to be evaluated in the circumstances presented and based on the record then before us. This case is different. Delta has, until recently, been actively conducting operations in the markets involved, and has, until now, not sought a dormancy waiver for these services. Moreover, neither American, Continental or any other carrier expressed an interest in using the frequencies at issue here. Under these circumstances, and taking into account the prevailing market conditions, we find that the limited relief sought by the carrier is warranted.³ However, we are putting Delta on notice, as we have other carriers in similar circumstances, that there should be no expectation that an additional request will similarly be granted. As we have previously done, we reserve the right to reexamine whether grant of this waiver continues to be in the public interest should another carrier seek to use the frequencies at issue. Any future request to extend the dormancy waiver for the frequencies at issue here will have to be considered in light of the specific arguments offered and responses thereto.

(See Next Page)

² Delta's waiver from the dormancy condition is effective through December 31, 2003, or until the date on which Delta begins service with each of these frequencies, whichever occurs earlier. As to any frequency with which Delta does not begin service by December 31, 2003, its frequency allocation with respect to that frequency expires automatically.

³ We have granted dormancy waivers stretching over a number of months to carriers providing combination services in cases where we concluded that the result was consistent with the public interest. See, e.g., Notice of Action Taken dated January 23, 2003, in Docket OST-2002-12183.

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy; and (2) grant of the authority was consistent with the public interest. To the extent not granted, we denied all requests in the referenced Docket. We may amend, modify, or revoke the action taken in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp*